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No. 85-244

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

ADVENTURERS WHITESTONE CORPORATION,

Appellant,

vs.

THE CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

MOTION TO DISMISS OR AFFIRM

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October 9, 1985

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30 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE 2

ARGUMENT

SINCE ADVENTURERS RECEIVED BOTH PRE- AND POSTJUDGMENT INTEREST ON ITS CONDEMNATION AWARD AT THE STATUTORY RATE BECAUSE OF ITS ELECTION NOT TO CONTEST THAT RATE DURING THE LITIGATION OF ITS CLAIM FOR JUST COMPENSATION, IT WAS CORRECT TO DISMISS ADVENTURERS' SUBSEQUENT COMPLAINT FOR ADDITIONAL INTEREST ON GROUNDS OF RES JUDICATA. IT FOLLOWS THAT DISMISSAL OF THE COMPLAINT DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION. MOREOVER, THE APPLICATION OF RES JUDICATA IS AN ADEQUATE NON-FEDERAL BASIS FOR THE JUDGMENT..... 9

CONCLUSION 25

TABLE OF AUTHORITIES

Cases:	Page
Adventurers Whitestone Corporation v. The City of New York, 65 N.Y. 2d 83, 479 N.E. 2d 241, 489 N.Y.S. 2d 896 (1985)	3, 4, 14, 15-16, 18-19, 23
Brown v. United States, 263 U.S. 78 (1923)	16, 23
City of Buffalo v. Clement Co., 28 N.Y. 2d 241, 269 N.E. 2d 895, 321 N.Y.S. 2d 345 (1971)	3
Eveandra Enterprises, Inc. v. County of Nassau, 51 A.D. 2d 722, 378 N.Y.S. 2d 786 (2d Dept., 1976), aff'd 42 N.Y. 2d 849, 366 N.E. 2d 287, 397 N.Y.S. 2d 627 (1977), App. dism. 434 U.S. 804 (1977)	9-10, 11
Henry v. Mississippi, 379 U.S. 443 (1965)	18
Herb v. Pitcairn, 324 U.S. 117 (1945)	18
Herndon v. Georgia, 295 U.S. 441 (1935)	19
Kirby Forest Industries, Inc. v. United States, 467 U.S. _____, 104 S. Ct. 2187 (1984)	14, 15

Louisville & Nashville R. R. Co. v. Woodford, 234 U.S. 46 (1914) 19

Matter of City of New York (Brookfield Refrigeration Corporation), 58 N.Y. 2d 532, 449 N.E. 2d 399, 462 N.Y.S. 2d 619 (1983) 2, 7, 12, 13, 14-15, 20

Matter of City of New York (Chrystie Street), 264 N.Y. 319, 190 N.E. 654 (1934) 16-17

Matter of City of New York (Glantz), 82 A.D.2d 829, 429 N.Y.S. 2d 676 (2d Dept., 1981), aff'd 55 N.Y. 2d 345, 434 N.E. 2d 1036, 449 N.Y.S. 2d 669 (1982) 5

Matter of City of New York (New Munic. Bldg.), 57 Misc 2d 156, 291 N.Y.S. 2d 656 (Sup.Ct., N.Y. Co., 1968), aff'd sub nom. Matter of City of New York (Manhattan Civic Center Area), 32 A.D.2d 530, 299 N.Y.S. 2d 575 (1st Dept., 1969), aff'd 27 N.Y. 2d 518, 261 N.E. 2d 808, 313 N.Y.S. 2d 995 (1970) 12, 20

Matter of City of New York (Roteeco Corp.), 33 N.Y. 2d 970, 309 N.E. 2d 135, 353 N.Y.S. 2d 736 (1974) 20

Matter of Rochester Carting Co. v. Levitt, 36 N.Y. 2d 242, 326 N.E. 2d 808, 367 N.Y.S. 2d 242 (1975) 10, 23

Michigan v. Long, 463 U.S. 1032 (1983) 18, 22

Parker v. North Carolina, 397 U.S. 790 (1970) 19

Seaboard Air Line Ry. v. U.S., 261 U.S. 299 (1923) 3, 23

South Bronx Neighborhood Development Plan, 110 Misc. 2d 571, 442 N.Y.S. 2d 869 (Sup. Ct., Bronx Co., 1981), aff'd 89 A.D. 2d 948, 454 N.Y.S. 2d 566 (1st Dept. 1982), aff'd 58 N.Y. 2d 532, 449 N.E. 2d 399, 462 N.Y.S. 2d 619 (1983) 7, 14-15

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) 21

Statutes:

General Municipal Law §3-a (2) 2, 4, 22

N.Y.C. Administrative Code §B15-28.0 21

Other Authority:

Fifth Amendment of the United States Constitution 4, 12

Fourteenth Amendment of the United States Constitution 4, 13

No. 85-244

IN THE
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ADVENTURERS WHITESTONE CORPORATION,

Appellant,

vs.

THE CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

MOTION TO DISMISS OR AFFIRM

PRELIMINARY STATEMENT

Pursuant to Rule 16.1 of the Rules of this Court, the appellee, the City of New York ("City"), moves that the appeal be dismissed, or in the alternative that the judgment of the New York Court of Appeals be affirmed.

STATEMENT OF THE CASE

(1)

Appellant, Adventurers Whitestone Corporation (hereafter "Adventurers"), attacks the interpretation placed by the New York State Court of Appeals on General Municipal Law, Sec. 3-a(2). This statute provides:

> The rate of interest to be paid upon any judgment or accrued claim against the municipal corporation arising out of condemnation proceedings or action to recover damages for wrongful death shall not exceed six per centum per annum.

Pursuant to this statute, the courts have held that the 6% statutory rate is binding on a condemnee unless the condemnee introduces proof to overcome the presumed correctness of the rate during the litigation of its claim for just compensation. Matter of City of New York (Brookfield Refrigeration Corporation), 58 N.Y. 2d 532, 449

N.E. 2d 399, 462 N.Y.S. 2d 619 (1983); City of Buffalo v. Clement Co., 28 N.Y. 2d 241, 269 N.E. 2d 895, 321 N.Y.S. 2d 345 (1971). This interpretation follows the mandate of this Court that interest is part of judicially required just compensation. Seaboard Air Line Ry. v. U.S., 261 U.S. 299 (1923).

(2)

Adventurers was a condemnee which did not express dissatisfaction with the 6% statutory rate during the litigation of its claim for just compensation. However, after it accepted its condemnation award with 6% interest added up to the date of availability of payment, it commenced a plenary action for additional interest. The Court of Appeals ordered the dismissal of the complaint in accordance with "usual principles of claim preclusion" (res judicata), finding Adventurers' plenary action to be an unlawful attempt to raise in a second action an issue which it could have raised in the condemnation proceeding itself. 65 N.Y. 2d 83, 89, 479 N.E. 2d 241, 245, 489 N.Y.S.2d 896, 900

(1985) (App. A9).* The Court of Appeals also made reference to the doctrine that, although prejudgment interest on a condemnation award is required by the just compensation clause of the Federal and State Constitutions, postjudgment interest is payable under the statute to compensate for delay in payment of the award. 65 N.Y. 2d 83, 85, 479 N.E. 2d 241, 242, 489 N.Y.S. 2d 896, 897 (App. A2-3). Since Adventurers received both pre- and postjudgment interest and had elected not to contest the statutory rate in the condemnation proceeding, it was held not entitled to maintain a subsequent action for additional interest.

Adventurers alleges that, as applied to it, the Court of Appeals' interpretation of General Municipal Law, Sec. 3-a(2), is repugnant to the Fifth and Fourteenth Amendments of the Constitution of the United States.

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*Appendix references are to the Appendix to the Jurisdictional Statement. Page references to the statement itself will be preceded by "J.S."

(3)

Adventurers owned certain real estate in the City of New York, County of Queens. The City acquired this property on April 4, 1974 through the exercise of its power of eminent domain. Litigation of Adventurers' claim for just compensation was conducted in Queens County and continued until December 6, 1978 (J.S. 2). A judgment by the Trial Court, entered on July 18, 1979, awarded Adventurers $529,750 for its property. Appeals were taken by both Adventurers and the City. The Appellate Division modified the judgment to $573,850 and the Court of Appeals affirmed sub nom. Matter of City of New York (Glantz), 82 A.D. 2d 829, 439 N.Y.S. 2d 676 (2d Dept., 1981), aff'd 55 N.Y. 2d 345, 434 N.E. 2d 1036, 449 N.Y.S. 2d 669 (1982). Following the Court of Appeals' affirmance, the City made payment of the balance due Adventurers, with interest thereon included at 6% from the date of condemnation to the date of payment. Total payment amounted to $831,067.73.

In 1982, Adventurers collected the award. In 1983, it commenced a new action in New York County for additional interest of 3%. It was, and is, Adventurers' position that the issue of the rate of interest on a condemnation award need not be raised during the trial of a claim for just compensation, but may instead be the subject of a separate lawsuit after the condemnation judgment is entered and the award, inclusive of statutory interest to the date of payment, is collected.

In the new proceeding, Adventurers conceded that it had adduced no proof to overcome the presumed correctness of the 6% statutory interest rate during the litigation of its claim for just compensation, which resulted in the aforementioned judgment entered on July 18, 1979. Nevertheless, it contended that it was entitled to additional interest because, in 1981, a decision in a different county, and in an entirely different case, awarded 9% interest, as of January 1, 1978, to certain condemnees who, in contrast with Adventurers,

during litigation of their claims for just compensation introduced proof deemed sufficient to overcome the 6% statutory rate. South Bronx Neighborhood Development Plan, 110 Misc. 2d 571, 442 N.Y.S. 2d 869 (Sup. Ct., Bronx Co., 1981), aff'd 89 A.D. 2d 948, 454 N.Y.S. 2d 566 (1st Dept., 1982), aff'd sub nom. Matter of City of New York (Brookfield Refrigeration Corporation), 58 N.Y. 2d 532, 449 N.E. 2d 399, 462 N.Y.S. 2d 619 (1983).

Thus the New York courts were presented with the following question:

> may Adventurers, which collected its condemnation award, with statutory interest to the date of payment, without any challenge to the statutory rate, bring a subsequent plenary action for additional interest because of a later decision awarding interest at a higher rate to unrelated condemnees who challenged the statutory rate in a different condemnation proceeding?

The Court of Appeals answered this question in the negative. It recognized that payment to Adventurers had been postponed due to appeals from the judgment of the Trial Court. However, it did

not consider this circumstance as providing a basis for departure from the settled law that a condemnee who does not express dissatisfaction with the statutory rate of interest during the litigation of its claim for just compenstaion may not receive interest at a higher rate.

ARGUMENT

SINCE ADVENTURERS RECEIVED BOTH PRE- AND POSTJUDGMENT INTEREST ON ITS CONDEMNATION AWARD AT THE STATUTORY RATE BECAUSE OF ITS ELECTION NOT TO CONTEST THAT RATE DURING THE LITIGATION OF ITS CLAIM FOR JUST COMPENSATION, IT WAS CORRECT TO DISMISS ADVENTURERS' SUBSEQUENT COMPLAINT FOR ADDITIONAL INTEREST ON GROUNDS OF RES JUDICATA. IT FOLLOWS THAT DISMISSAL OF THE COMPLAINT DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION. MOREOVER, THE APPLICATION OF RES JUDICATA IS AN ADEQUATE NON-FEDERAL BASIS FOR THE JUDGMENT.

(1)

This Court's practice of dismissing appeals for want of a substantial federal question is well established. As recently as 1977, this Court dismissed an appeal from a decision of the New York Court of Appeals which included the same determination which is the basis for the present appeal. Eveandra Enterprises, Inc. v. County of

Nassau, 42 N.Y. 2d 849, 366 N.E. 2d 287, 397 N.Y.S. 2d 627 (1977), app. dism. 434 U.S. 804 (1977).

The opinion states (42 N.Y.2d at 850, 366 N.E. 2d at 287-288, 397 N.Y.S.2d at 628):

> We agree ... that claimant has not demonstrated that the validity of the statutory prejudgment interest rate of 6% is constitutionally infirm. Compensation accruing at the time of vesting and for the period prior to an award in a condemnation proceeding "is payable as a substitute for the beneficial use of real property" (Matter of Rochester Carting Co. v. Levitt, 36 NY 2d 264, 268, 367 N.Y.S. 2d 242, 245, 326 N.E. 2d 808, 810). (Emphasis supplied)

There is no more substantiality to the questions presented here than existed in Eveandra. In that case the condemnee adduced proof during the litigation of its claim for just compensation seeking to overcome the presumed correctness of the 6% statutory interest rate. The judgment of the

trial court, which denied Eveandra interest in excess of 6%, was entered on June 26, 1975 (See 51 A.D. 2d 722, 378 N.Y.S. 2d 786 [2d Dept., 1976]).

In this case, Adventurers seeks review of the denial of interest in excess of 6% even though it elected not to challenge the 6% rate during the litigation of its claim for just compensation. It characterizes its nonfeasance in this respect as "not surprising" in view of the 1977 Court of Appeals decision in Eveandra (J.S. 3). However, Adventurers ignores the fact that, since the Eveandra judgment was entered on June 26, 1975, the period covered thereby did not account for economic conditions prevailing at a later date. Adventurers' judgment was entered on July 18, 1979, and the litigation of its claim for just compensation had continued until December 6, 1978. Adventurers points out that the litigation on December 6, 1978 consisted of a "Hearing on Objections" (J.S. 2), but that does not mitigate its lack of challenge or proof. It is the usual practice in New York City condemnation

proceedings to litigate the issue of rate of interest during the Hearing on Objections; and this may be done even if the issue was not raised earlier in the proceeding. Matter of City of New York (Brookfield Refrigeration Corporation), supra , 58 NY 2d at 535, 36, 449 N.E. 2d at 400, 462 N.Y.S. 2d at 620; Matter of City of New York (New Munic. Bldg.), 57 Misc 2d 156, 157, 291 N.Y.S. 2d 656, 657 (Sup. Ct., N.Y. Co., 1968), aff'd sub nom. Matter of City of New York (Manhattan Civic Center Area), 32 A.D. 2d 530, 299 N.Y.S. 2d 575 (1st Dept., 1969), aff'd 27 N.Y. 2d 518, 261 N.E. 2d 808, 313 N.Y.S. 2d 995 (1970). Thus, Adventurers had the opportunity to adduce proof to overcome the 6% rate at the December 6, 1978 hearing and failed to avail itself of that opportunity.

(2)

Adventurers claims that to require submission of proof as to the interest rate during the litigation of the claim for just compensation is repugnant to the just compensation clause of the Fifth Amendment and the due process clause of the

Fourteenth Amendment of the Constitution of the United States (J.S. I). It urges that this requirement deprived it of just compensation and due process because appeals caused postponement of payment until 1982. Between the date of judgment and the date of payment, the Brookfield decision was handed down; and it provided for interest at 9% as of January 1, 1978 (J.S. 3). Adventurers proposes the novel theory that a condemnee who expresses no dissatisfaction with a statutory rate during the litigation of its claim for just compensation and collects its condemnation award, including prejudgment interest at the statutory rate and postjudgment interest at the same rate, should thereafter be permitted to make a subsequent claim for interest at a higher rate. No authority has been found to support Adventurers' theory that a condemnee may split its cause of action for just compensation by making its claim for interest or "delay compensation" the subject of a separate post judgment and post payment action.

Kirby Forest Industries, Inc. v. United States, 467 U.S._____, 104 S. Ct. 2187 (1984), relied on by Adventurers, does not support its position (J.S. I). In Kirby Forest, this Court pointed out that, when land value changes materially between the date of valuation and the date the judgment is paid, the effect of this interim change in value should be accounted for. However, as noted by the Court of Appeals, Adventurers' action here is "separate and apart from the condemnation proceeding and ... is predicated on a change in interest rate rather than a change in value," 65 N.Y. 2d at 88, n. 4, 479 N.E. 2d at 244, 489 N.Y.S. 2d at 899 (App. A6-7). Secondly, there was no change in the applicable rate between the conclusion of the litigation of Adventurers' claim for just compensation and its collection of payment. Brookfield, decided by the trial court on August 7, 1981 (110 Misc. 2d 571, 442 N.Y.S. 2d 869, supra), held that condemnees who introduced proof to overcome the 6% statutory rate during the litigation of their claims for just compensation

established that economic conditions prevailing after January 1, 1978 entitled them to 9% interest as of that date. Brookfield also held that this proof was insufficient to support a rate in excess of 9% subsequent to 1978. Litigation of Adventurers' condemnation claim continued until December 6, 1978. Adventurers' judgment was entered on July 18, 1979. After the appeals were disposed of, payment was made in 1982. There was no change in the interest rate during the interim period. The controlling reason for denying to Adventurers interest in excess of 6% is that it did not raise the issue of interest rate in the condemnation proceeding. In discussing Kirby Forest further, the Court of Appeals indicated its recognition of the due process issue raised by Adventurers.

Specifically, the Court of Appeals stated (65 N.Y. 2d at 88, n. 5, 479 N.E. 2d at 244, 489 N.Y.S. 2d at 899; App. A7):

> When the constitutional interest issue has been raised before the

> condemnation court and during the time necessary to dispose of the appeal the interest rate undergoes a substantial upward change, it may, therefore, be necessary to accord the claimant a further hearing at which that fact can be established.

However, Adventurers did not raise the interest issue before the condemnation court; nor did the rate undergo an upward change while Adventurers' judgment was on appeal. Consequently, the abovementioned concept is not applicable to Adventurers.

Adventurers' position is not supported by Brown v. United States, 263 U.S. 78 (1923) (J.S. 8). In that case, the change in time between the fixing of value and payment refers to the value of the real estate, not the interest rate. As to interest, Brown gives approval to the inclusion of interest to the date of judgment, Id. at 80.

Matter of City of New York (Chrystie Street), 264 N.Y. 319, 190 N.E. 654 (1934) (J.S. I, 5) is also of

no assistance to Adventurers. That case involved the construction of a statute which cuts off interest on a condemnation award entirely six months after a condemnation decree was entered unless a demand for additional interest is made. The Court of Appeals interpreted this statute to permit the six month period, in the case of a condemnation award modified on appeal, to run from the date of modification. Neither the statute nor its interpretation is applicable here where Adventurers received interest on its award to the date of payment. Chrystie Street does not support the theory that a condemnee, who does not raise the issue of interest rate during the condemnation proceeding, may sue subsequently for interest at a rate higher than that paid pursuant to the condemnation judgment regardless of whether that judgment is modified on appeal.

(3)

Adventurers' appeal should be dismissed because the order appealed from rests on an adequate and independent state ground. The New

York Court of Appeals held that Adventurers' claim for additional interest on its condemnation award should have been raised at the condemnation trial and was thus barred by res judicata.

The dismissal of Adventurers' suit on the basis of "claim preclusion" (res judicata) requires dismissal of this appeal. This Court has long held that the prohibition on advisory opinions and the partitioning of power between the federal and state systems require the dismissal of an appeal when the decision below rests on "adequate and independent state grounds." Herb v. Pitcairn, 324 U.S. 117, 125 (1945); Michigan v. Long, 463 U.S. 1032, 1041 (1983); Henry v. Mississippi, 379 U.S. 443, 446-448 (1965).

Central to the New York Court's decision is the holding that, under New York law, Adventurers' suit is barred by res judicata: "Here plaintiff neither raised the question of the rate of interest constitutionally required in the condemnation proceeding nor preserved by stipulation its right to litigate the issue in another forum. Its claim to the

higher rate of interest is, therefore, barred by res judicata" (65 N.Y. 2d at 91, 479 N.E. 2d at 246, 489 N.Y.S. 2d at 901; App. A11). Since Adventurers did not raise the constitutional issue at its condemnation trial, it has waived the right to raise it in a subsequent law suit. This case is similar to numerous other cases in which this Court held that the waiver of a federal claim by failure to raise it at the proper time below constitutes an adequate state ground precluding review. Illustrative of the cases where procedural failure under state law precluded Supreme Court review are: Parker v. North Carolina, 397 U.S. 790, 798 (1970) (a failure to object to the composition of a grand jury before the entry of a guilty plea); Herndon v. Georgia, 295 U.S. 441 (1935) (a failure to preserve the issue for appeal, such as by properly making exceptions or assigning errors); Louisville & Nashville R.R. v. Woodford, 234 U.S. 46 (1914) (the raising of a federal issue for the first time in the appellate court, without bringing it to the trial court's attention).

The principle of res judicata was properly applied in the instant case. In answer to its claim that it could not have litigated the interest issue in the condemnation proceeding, the Court of Appeals stated: "Indeed, the interest issue has been litigated before the condemnation court in a number of cases (Matter of City of New York [Brookfield Refrig. Corp.], 58 NY 2d 532 [449 N.E. 2d 399, 462 N.Y.S. 2d 619], supra; Matter of City of New York [Roteeco Corp.], 33 NY 2d 970 [309 N.E. 2d 135, 353 N.Y.S. 2d 736], Matter of City of New York [Manhattan Civic Center Area], 27 NY 2d 518 [261 N.E. 2d 808, 313 N.Y.S. 2d 995], affg 32 AD 2d 530 [299 N.Y.S. 2d 575], affg 57 Misc 2d 156 [291 N.Y.S. 2d 656]. There was, therefore, no bar to plaintiff's raising the issue in the Queens proceeding" (65 N.Y. 2d at 89, 479 N.E. 2d at 245, 489 N.Y.S. 2d at 900; App. A8-9).

The test for adequacy of the state ground is also met by res judicata. Adequacy requires that, if the Supreme Court were to rule on the federal

question in the case, it would not affect the outcome below; and thus such ruling would merely be an advisory opinion. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 566 (1977). A ruling here that postjudgment interest is part of constitutionally required just compensation would not lift the bar to Adventurers' suit.

Finally, to be deemed independent, the state court's ruling must be founded on state law and supported by state court precedent. A reading of the decision below demonstrates that the court's ruling here was reached pursuant to an interpretation of New York City Administrative Code §B15-28.0 and applicable New York case law concerning res judicata. (See App. 9-11 for citation of cases.) The fact that the New York court reached the federal question presented in the case does not change the analysis. Where both federal and state grounds are present in a case, the Court will dismiss if the non-federal ground adequately supports the decision and its independence is

apparent from the "four corners of the opinion." Michigan v. Long, supra, 463 U.S. at 1040

(4)

Although General Municipal Law, Sec 3-a(2), limits a condemnation award to 6% per annum, the New York courts' interpretation of the statute permits interest at a higher rate to condemnees who overcome the presumed correctness of the statutory rate during the litigation of their claims for just compensation. As so interpreted, the statute is not repugnant to the Constitution of the United States. Adventurers was limited to 6% interest on its award because it did not claim interest in excess of 6% during the condemnation proceeding. It follows that Adventurers' appeal does not present a substantial federal question and should be dismissed.

(5)

The determination that postjudgment interest is not part of constitutional just compensation is not repugnant to the United States Constitution. Adventurers concedes that this ruling follows prior

decisional law in New York State and in other jurisdictions (J.S. 10, 11 [footnotes]). Matter of Rochester Carting Co. v. Levitt, 36 N.Y. 2d 264, 326 N.E. 2d 808, 367 N.Y.S. 2d 242 (1975), is the New York decision, cited in Adventurers to support the Court of Appeals' conclusion as to postjudgment interest (65 N.Y. 2d at 87, 479 N.E. 2d at 243, 489 N.Y.S. 2d at 898; App. A5-6).

In Rochester Carting, the Court of Appeals upheld a statute permitting interest to be cut off entirely 20 days after the State Comptroller is authorized to issue a warrant for payment of a condemnation award. The opinion points out that there is no common law right to interest on a judgment (36 N.Y. 2d at 267, 326 N.E. 2d at 810, 367 N.Y.S. 2d at 245).

Adventurers cites cases decided by this Court wherein the government sought to avoid payment of interest entirely. Seaboard Air Line Ry. v. U.S., 261 U.S. 299 (1923); Brown v. United States, 263 U.S. 78 (1923). None of the authority relied on involves a

situation such as that present here: where condemnee received pre- and postjudgment interest at the statutory rate, thereby silently acquiescing to that rate during the litigation of its claim for just compensation. Since this acquiescence provides an "adequate and independent state ground" to support the order appealed from (supra), and since Adventurers here received postjudgment interest to the date of payment, there is insufficient basis for the instant appeal.

CONCLUSION

This appeal should be dismissed for lack of jurisdiction. Alternatively, the judgment of the Court of Appeals should be affirmed.

Dated: October 9, 1985

Respectfully submitted,

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